

July 27, 2015

The Honorable John Barrasso  
Chairman  
Committee on Indian Affairs  
United States Senate  
Washington, DC 20510

The Honorable Jon Tester  
Vice Chairman  
Committee on Indian Affairs  
United States Senate  
Washington, DC 20510

**Re: Submission for July 15 Hearing on Juvenile Justice in Indian Country**

Dear Chairman Barrasso and Vice Chairman Tester:

I write to present the views of the American Bar Association with regard to the state of juvenile justice in Indian country. I request that this letter be included in the record of your July 15 oversight hearing, “Juvenile Justice in Indian Country: Challenges and Promising Strategies.”

Within an ever-changing legal, economic, and cultural landscape, the challenges facing American Indian and Alaska Native youth are numerous and complex. The Indian Law and Order Commission (ILOC), an independent national advisory commission created by the Tribal Law and Order Act in 2010, has undertaken a comprehensive examination of this issue and presented findings and recommendations in Chapter Six of its November 2013 Report to the President and Congress, *A Roadmap for Making Native America Safer*.

After extensive review of the Commission’s work, the ABA endorsed the Report’s recommendations and is committed to advancing their implementation. The blackletter recommendations contained in Chapter Six (“Juvenile Justice: Failing the Next Generation”) are attached to this letter; the entire report is available at: <http://www.aisc.ucla.edu/iloc/report>.

The Commission’s 12 recommendations regarding juvenile justice are grounded in findings that Native youth are among the most vulnerable group of children in the United States as a result of centuries of harmful public policies that continue to inflict intergenerational trauma on children in Indian country. Upon entering the juvenile justice system, tribal youth are further endangered by being thrust into an exceedingly complicated web of jurisdictional rules and sentencing limitations that subject them to complex and inadequate federal and state juvenile justice systems. While the ABA supports all 12 recommendations, we believe it is of utmost importance that tribes are empowered with meaningful decision-making authority about their own juvenile justice systems and that greater emphasis is placed on providing alternatives to incarceration and culturally appropriate intervention and support. With this focus in mind, we would like to highlight several of the Commission’s recommendations.

### **Recommendations Concerning Jurisdiction**

Native youth are disproportionately incarcerated in the federal system where they do not receive age-appropriate educational instruction or assistance because the federal system does not have a juvenile division and is not equipped to provide these services. The Commission recommends that Congress strengthen tribal jurisdiction over Indian children by empowering tribes to opt out of federal and state juvenile jurisdiction entirely, except for federal laws of general application. The Commission's recommendation would cut through the current jurisdictional maze and enable youth to receive meaningful and appropriate intervention.

If tribes choose not to opt out entirely, Congress should provide tribes with the right to consent to any U.S. Attorney's decision before federal criminal charges against any juvenile can be filed. The Commission explained that requiring tribal consent would help ensure that community standards are applied and tribal sentencing options carefully considered before any federal prosecution could proceed.

### **Recommendations Related to Strengthening Tribal Justice for Native Youth**

The Commission found that juvenile cases are inconsistently referred to the federal or county system in P.L. 83-280 states, not because tribes lack sufficient sentencing authority, but because tribes frequently lack the resources to address the youths' need for treatment. The Commission recommends reallocating federal and state resources to tribes that assume exclusive jurisdiction over juvenile justice. To do this effectively, a single agency within the U.S. Department of Justice should be designated to distribute block funding to tribes rather than funding being disbursed through unpredictable and burdensome grant programs. Furthermore, funds should be provided at a level of parity with non-Indian systems. Because Native youth will continue to be incarcerated in both federal and state systems as well, federal and state juvenile justice systems should maintain proper records of their entry into the system and adopt a consistent data collection system that includes information about tribal membership. Finally, a single federal agency should be created to coordinate data collection, examine specific needs, and make recommendations for Native youth.

### **Recommendations Concerning Detention and Alternatives**

Native youth who enter the federal or state justice system often are incarcerated far from their homes and communities and detained in facilities with no youth educational programs or opportunities. The Commission recommends that federal, state and tribal justice systems seek to provide alternatives to incarceration and that all youths should be provided trauma-informed screening and care, preferably in a community-based setting.

Similarly, violent Native juveniles should be provided treatment and detention facilities within a reasonable distance from the juvenile's home. The ABA emphasizes the importance of providing alternatives to incarceration and early and appropriate screening and treatment.

### **Recommendations Concerning Intergovernmental Cooperation**

The Commission recommends amending the Federal Delinquency Act, which currently fosters federal consultation and coordination with states and U.S. territories, to include tribes and to extend their authority to allow or prevent transfer of a juvenile for prosecution as an adult regardless of the child's age or offense. The Commission also recommends improving cooperative measures between tribes and local governments by amending the Indian Child Welfare Act to provide that when a state court initiates delinquency proceedings involving an Indian child, all of its notice, intervention, and transfer provisions will apply.

The recommendations of the ILOC Report regarding juvenile justice in Indian country seek to replace outdated and top-down bureaucracies with locally based approaches that will enable tribal governments to provide justice in their own communities and more effectively address the disproportionate amount of violence occurring in Indian country today. These approaches align with long-standing ABA policies supporting criminal justice system improvements and tribal self-determination.

We urge the Committee to endorse these recommendations and make their enactment a priority this Congress. We stand ready to assist you however we can.

Thank you for your consideration of the ABA's views.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman  
Director, Governmental Affairs Office

Attachment: Chapter 6 Recommendations

## **A Roadmap for Making Native America Safer**

### **Chapter 6 - Juvenile Justice: Failing the Next Generation**

#### **Recommendations**

6.1 Congress should empower Tribes to opt out of Federal Indian country juvenile jurisdiction entirely and/or congressionally authorized State juvenile jurisdiction, except for Federal laws of general application.

6.2 Congress should provide Tribes with the right to consent to any U.S. Attorney's decision before Federal criminal charges against any juvenile can be filed.

6.3 Because resources should follow jurisdiction, and the rationale for Tribal control is especially compelling with respect to Tribal youth, resources currently absorbed by the Federal and State systems should flow to Tribes willing to assume exclusive jurisdiction over juvenile justice.

6.4 Because Tribal youth have often been victimized themselves, and investments in community-oriented policing, prevention, and treatment produce savings in costs of detention and reduced juvenile and adult criminal behavior, Federal resources for Tribal juvenile justice should be reorganized in the same way this Commission has recommended for the adult criminal justice system. That is, they should be consolidated in a single Federal agency within the U.S. Department of Justice, allocated to Tribes in block funding rather than in unpredictable and burdensome grant programs, and provided at a level of parity with non-Indian systems. Tribes should be able to redirect funds currently devoted to detaining juveniles to more demonstrably beneficial programs, such as trauma-informed treatment and greater coordination between Tribal child welfare and juvenile justice agencies.

6.5 Because Tribal communities deserve to know where their children are and what is happening to them in State and Federal justice systems, and because it is impossible to hold justice systems accountable without data, both Federal and State juvenile justice systems must be required to maintain proper records of Tribal youth whose actions within Indian country brought them in to contact with those systems. All system records at every stage of proceedings in State and Federal systems should include a consistently designated field indicating Tribal membership and location of the underlying conduct within Indian country and should allow for tracking of individual children. If State and Federal systems are uncertain whether a juvenile arrested in Indian country is in fact a Tribal member, they should be required to make inquiries, just as they are for dependency cases covered by the Indian Child Welfare Act.

6.6 Because American Indian/Alaska Native children have an exceptional degree of unmet need and the Federal government has a unique responsibility to these children, a single Federal agency should be created to coordinate the data collection, examine the specific needs, and make recommendations for American Indian/Alaska Native youth. This should be the same agency within the U.S. Department of Justice referenced in Recommendation 6.4. A very similar recommendation can be found in the 2013 Final Report of the Attorney General's National Task Force on Children Exposed to Violence.

6.7 Whether they are in Federal, State, or Tribal juvenile justice systems, children brought before juvenile authorities for behavior that took place in Tribal communities should be provided with trauma-informed screening and care, which may entail close collaboration among juvenile justice agencies, Tribal child welfare and behavioral health agencies. A legal preference should be established in State and Federal juvenile justice systems for community-based treatment of Indian country juveniles rather than detention in distant locations, beginning with the youth's first encounters with juvenile justice, Tribes should be able to redirect Federal funding for construction and operation of juvenile detention facilities to the types of assessment, treatment, and other services that attend to juvenile justice.

6.8 Where violent juveniles require treatment in some form of secure detention, whether it be through BOP-contracted State facilities, State facilities in P.L. 83-280 or similar jurisdiction, or BIA facilities, that treatment should be provided within a reasonable distance from the juvenile's home and informed by the latest and best trauma research as applied to Indian country.

6.9 The Federal Delinquency Act, 18 U.S.C. § 5032, which currently fosters Federal consultation and coordination only with States and U.S. territories, should be amended to add "or tribe" after the word "state" in subsections (1) and (2).

6.10 The Federal Delinquency Act, 18 U.S.C. § 5032, should be amended so that the Tribal election to allow or disallow transfer of juveniles for prosecution as adults applies to all juveniles subject to discretionary transfer, regardless of age or offense.

6.11 Federal courts hearing Indian country juvenile matters should be statutorily directed to establish pretrial diversion programs for such cases that allow sentencing in Tribal courts.

6.12 The Indian Child Welfare Act should be amended to provide that when a State court initiates any delinquency proceeding involving an Indian child for acts that took place on the reservation, all of the notice, intervention, and transfer provisions of ICWA will apply. For all other Indian children involved in State delinquency proceedings, ICWA should be amended to require notice to the Tribe and a right to intervene.